HAWAII CONDOMINIUM BULLETIN

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2007 Legislative Update Affecting Condominiums

The 2007 Legislative session closed on May 3, 2007. Governor Linda Lingle had until June 25, 2007, to notify the Legislature whether she would veto the bills or allow them to become law with or without her signature by July 10, 2007. The Legislature may override the Governor's veto by two-thirds vote in each house. This update includes an unofficial status report of legislative action current to the date of this Bulletin.

The following discussion highlights some of the statutory amendments to Chapter 514A and 514B (recodified law) Hawaii Revised Statutes (HRS), Condominium Property Regimes and other related amendments.

Readers are advised to consult the full text of the Acts as this discussion is intended only to briefly summarize the amendments and does not constitute legal advice.

The summaries are not intended to be an exhaustive list or to cover all provisions of the new laws. Interested readers may access the Legislature's website, www.capitol.hawaii.gov, to read the full text of the bills or print copies of the Acts.

For specific advice as to how the provisions of the new Acts apply to a particular circumstance, readers should seek the advice of a licensed Hawaii attorney familiar with the condominium law. The *new Acts* include:

Act 21 (SLH 2007) SB 923 amends Act 164 (SLH 2004) to remove sunset and re-enactment of section 514B-146, HRS, relating to assessments and liens with respect to condominiums.

Section 514B-146, HRS, provides a process to assist condominium associations with the problem of collecting unpaid maintenance fees from apartment owners. The intent of SB 923 was to remove the sunset date of December 31, 2007, to allow this section to continue to provide relief to condominium associations in collecting delinquent maintenance fees, especially in cases where an apartment owner is undergoing foreclosure proceedings.

This section also includes a provision allowing a condominium association to recover up to \$1,800 of the last six months of delinquent maintenance fees from the purchaser of a delinquent apartment in a foreclosure sale, or subsequent purchaser.

Act 22 (SLH 2007) SB 1697 SD1 redefines "contractor" under Chapter 444, HRS, to ". . . any person, firm, partnership, corporation, association, or other organization that is engaged in the business of designing, manufacturing, supplying products, developing, or constructing, a dwelling."

Act 53 (SLH 2007) HB 1018 HD2 SD2 establishes a condominium hotel class of liquor license.

Act 166 (SLH 2007) SB 600 HD2 CD1 exempts from taxation one hundred percent of capital gains realized during taxable years 2008-2012 from sale of leased fee interest in condominium units to AOAO or residential cooperative corporations.

Resolutions adopted:

HR 228 (SLH 2007) HCR 287 requesting the Department of Commerce and Consumer Affairs to report on its experience with and to evaluate the current system for condominium dispute resolution.

SCR 160 SD1 (SLH 2007) requesting a sunrise review of the regulation of entities governed by Chapter 514A or 514B, HRS, and the enforcement of policies relating to condominiums in the state through the creation of a

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This material can be made available for individuals with special needs. Please call the Senior Condominium Specialist at (808) 586-2643 to submit your request.

The Hawaii Condominium Bulletin is funded by the Condominium Education Fund, Real Estate Commission, Professional and Vocational Licensing Division, Department of Commerce and Consumer Affairs, State of Hawaii.

Ask the Condominium Specialist

How do I know if I have the most current declaration and bylaws for my association?

According to Section 514B-153, Hawaii Revised Statutes (HRS), "An accurate copy of the declaration, bylaws, house rules if any, a sample original conveyance document,



Letter from the Chair...

As a normal course of events, understanding is gained through experience. Such is the case with the new condominium law, Chapter 514B, Hawaii Revised Statutes. After the enactment of the new law and its implementation, the realization of what needed to be changed or clarified became apparent. In the 2007 Legislative session, several bills

arose from various parties with hopes of addressing these issues. As of the date of this Bulletin, there were three acts that are known to have affected the condominium laws. The Governor had until June 25, 2007 to veto the remaining bills. Steps to update and distribute an unofficial copy of the law will commence after July 10, 2007. Be sure to review the Legislative update.



The deadline for the 2007–2009 Biennial AOAO Registration was last month. A two percent increase of online renewals is an encouraging sign. Those who renewed in a timely manner avoided the penalty fee. Other interesting reading included in this issue is a local case involving an AOAO dispute with a unit owner that proceeded to the Hawaii Supreme Court; and for Reference purposes, National Flood Insurance Program rules for homes in Special Flood Hazard Areas. Remember to view the Education and meeting calendar for the upcoming educational seminars and meeting issues. We will continue to keep you apprised of new acts that affect the condominium laws.

May you continue to enjoy the summer months with the longer days, warmer weather and more visits to the beach.

Sincerely,

William S. Chee

William S. Chee, Chair, Condominium Review Committee

all public reports and any amendments thereto, shall be kept at the managing agent's office." If you are not successful there, you may check with the Bureau of Conveyance (808) 587-0147, as all amendments to the declaration and bylaws are recorded there. The same information applies to condominiums created under the original condominium law, Chapter 514A, HRS.

It is the unit owner's responsibility to ensure that he/she become familiar with their own association's declaration and bylaws.

Our association has a resident manager. Is he required to have a real estate license?

A Basically no, if the resident manager does not engage in real estate activities, he/she is not required to have a real estate license. Generally, a resident manager is *employed* to be on-site to *manage the operation of the property*. This means that they are generally *not independent contractors* of the association, as managing agents are, but an *employee* of the association. However, many requirements regulating the conduct and responsibilities of a managing agent (licensed real estate broker or registered trust company) may apply to resident or general managers. The law provides that resident managers:

- May **not** solicit proxies for their own use from any unit owner of the association that employs them; nor cast any proxy vote at an association meeting, except to establish a quorum (§514B-123(i), HRS).
- May conduct background checks of prospective association employees (upon the applicant's written authorization) for a position that would allow the employee access to the keys of or entry into the units in the condominium or access to association funds (§514B-133, HRS).
- Must keep an accurate list of owners and make it available to other owners, with restrictions (§514B-153(e), HRS).
- Where no managing agent is retained and if employed by the association and delegated the responsibility, must accurately maintain documents and records of the association and make them available to owners, with restrictions (§514B-154(d), HRS) and the association must notify owners in advance of any costs of providing the information (§514B-105(d), HRS).
 - May **not** serve on the board (§514B-107(b), HRS).
- As employees, they may **not** sell or rent apartments in the project, except association-owned units, unless they have approval of 67% of unit owners under (§514B-133(b), HRS).

(Reference: Chapter 514B, Hawaii Revised Statutes)

Does that Coastal Home Comply with the NFIP Regs?

What makes a real estate investment attractive? Most buyers know exactly what they are looking for in a home. A well maintained house, awesome view, located in a good school district, profitable rental history, public transportation nearby, historically high resale values are among the top of their wish list. However, one important criteria a prospective buyer looks at during their brief Sunday afternoon open house visit is the structures potential for expansion.

However, buyers and even existing property owners may not be aware that some regulations may prohibit such improvements. The National Flood Insurance Program (NFIP) has explicit rules about development within a Special Flood Hazard Area (SFHA). Many coastal properties in Hawaii are within a flood zone identified as VE. With this designation comes strict rules that must be adhered to when development takes place in coastal high hazard areas. Some key points of Section 60.3(e) of Title 44 of the Code of Federal Regulations* are:

- All new and substantially improved structures shall be elevated such that the bottom of the lowest structural member of the lowest floor is at or above the Base Flood Elevation;
- Ensure that the pile or column foundation and structure is anchored to resist flotation, collapse and lateral movement due to the effects of wind and water loads acting simultaneously on all building components;
- Provide that all new construction is located landward of the reach of mean high tide;
- The space below the lowest floor must be either free of obstruction or constructed with non-supporting breakaway walls:
- The enclosed space (below the lowest floor) shall be used solely for parking of vehicles, building access, or storage;
- Prohibit the use of fill for structural support of buildings;
- Prohibit man-made alteration of sand dunes and mangrove stands.
- * (To read the complete copy of the regulations, visit: http://www.access.gpo.gov/nara/cfr/waisidx_02/44cfr60_02.html)

These coastal regulations are intended to protect life and property from the destructive forces of Mother Nature.

For prospective buyers, it's important to do your homework! Know what the limitations of the property are with respect to your expectations. Don't be afraid to call your local community officials to discuss your proposed plans, preferably before you make any financial commitment.

For existing coastal homeowners, it's sometimes tempting to want to add that fourth bedroom or large family room to the unused space below your elevated structure. Before proceeding with your project, talk with your local building official about your renovation plans.

There are consequences to constructing non-compliant



Anini Beach, Kauai

structures within a SFHA. Section 1316 of the National Flood Insurance Act of 1968, allows States to declare a structure in violation of a law, regulation or an ordinance. The result is that flood insurance will no longer be available to that property. The only way insurance will be restored, is if the violation is corrected and the 1316 Declaration is rescinded. This makes owning or selling a Section 1316 structure difficult, as lenders are mandated to require flood insurance on a collateral structure located in a SFHA for any Federally-backed loan.

The consequences could not only affect individual property owners, but the entire community as well. If FEMA suspends a non-compliant community from the NFIP program, no flood insurance would be allowed to be sold in that community and Federal Disaster assistance would not be available.

A real life example of how non-compliance, and in this particular case not on the part of the County, can affect an entire community.

Monroe County, Florida is a coastal community participating in the NFIP. Also, referred to as the "Southernmost County in the United States," Monroe is situated in the Florida Keys and is made up of 822 islands, although only about 30 of them are actually inhabited.

As a popular travel destination, many home-owners were in violation of the NFIP regulations when they enclosed the lower floors of their elevated structures and used the space as vacation rentals.

The Community's Code Enforcement Program could not handle the large number of structures that had illegal ground floor enclosures. This problem prompted Monroe County to request the Federal Insurance Administration to institute an inspection program before renewal of the NFIP Standard Flood Insurance Policy. The program requires flood insured property owners to obtain an inspection of their property as a condition of renewing their policy. If the property owner does

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condominium commission.

The following bills await the Governor's action:

HB 487 HD1 SD1 makes technical amendments to a variety of state laws to implement pursuant to section 14 of Act 180 (SLH 2006) concerning references to Housing & Community Development Corporation of Hawaii (HCDCH) which was repealed with substituted references. Section 21 amends §467-2(5) (Real Estate Brokers and Salespersons) by repealing 201G (HCDCH) and adding 356D (Hawaii Public Housing Authority).

SB 920 SD 1 HD 1 limits the use or distribution of the condominium association member lists. It prohibits the distribution of membership lists for commercial and political purposes without prior written consent of a condominium association's board of directors; prevents the managing agent and resident manager from distributing association membership lists without the prior written consent of the board; makes membership lists the property of the association; and prevents the managing agent, resident manager, or board from using the information contained in the list to create separate lists for the purposes of evading the provision of the statute.

SB 921 SD1 HD1 limits the fee charged to a member to obtain copies of association records to not exceed one dollar per page, except the fee for pages exceeding 8° inches by 14 inches may exceed one dollar per page.

SB 1654 SD1 HD1 re-establishes requirements for condominium management dispute resolution in §514A, HRS.

SB 1704 SD1 HD1 makes technical and conforming amendments that relate to the original condominium law (§514A, HRS), specifically to reenact parts I, V, and VII of this chapter retroactive to July 1, 2006 that were repealed by section 26 of Act 154, Session Laws of Hawaii 2004.

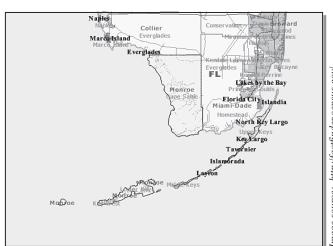
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not obtain an inspection, then their policy will not be renewed and will be identified as an ineligible property for the sale of flood insurance. This may trigger a lender to recall a loan, if flood insurance cannot be placed on the property. If the building does not pass an inspection and all efforts to remedy the situation have been exhausted, then the community could request a Section 1316 from FEMA.

Carol Tyau-Beam, P.E., CFM, State NFIP Coordinator, Hawaii Department of Land and Natural Resources, Engineering Division, "Wai Halana Hawaii Flood News." http:// www.hidlnr.org/eng/nfip/



Key West Florida



Standing Committees Met on Kauai

On June 15, 2007, the Real Estate Commission (Commission) convened its monthly standing committee meetings in Lihue, Kauai at the State Office Building, Rooms A, B, & C. The Commission also held a Condominium Specialist Office for the Day in conjunction with the meeting. Committee meetings and Condominium Specialist Office for the Day are held on different islands as part of the Commission's program of work.

The committee meetings provide the members of the condominium and real estate communities with an opportunity to attend the Commission's Laws and Rules, Education, and Condominium Review Committee meetings usually held on Oahu.

Administrative Actions

Hawaiiana Management Company, Ltd., and Richard J. McDougal, Principal Broker – REC 2004-101-L – REC 2004-101-L

RICO and Respondents entered into a Settlement Agreement Prior to Filing of Petition for Disciplinary Action. RICO had alleged that while acting as property manager for the condominiums at 620 Sheridan in Honolulu, the executive who handled the 620 Sheridan account signed a contract with a fence contractor and authorized disbursements to this contractor without obtaining consent of the Association of Apartment Owners of 620 Sheridan. The executive, who was not a real estate licensee, is no longer employed by Respondent. RICO asserted that the allegations, if proven at an administrative hearing, would constitute violations of HRS §467-1.6(a) (Principal broker shall have direct management and supervision of the brokerage firm) and §467-14(13) (violating the chapter). Respondents waived the right to contest the matter and agreed to dispose of the case with terms of the Settlement Agreement. The Hearings Officer recommended that Respondents pay a \$1,000 fine.

On December 15, 2006, the Commission accepted the Settlement Agreement.

Certified Management, Inc. and James E. McKellar – REC 2003-220-L and REC 2004-211-L

In March 2006, Respondents entered into a partial settlement of charges brought by RICO, and the Commission approved that partial settlement. A remaining charge in the petition (Count I) was considered at a hearing held August 31, 2006. The Hearings Officer reviewed and considered the evidence and arguments presented and rendered the following findings of fact, conclusions of law, and recommended order: Certified Management is the managing agent for the Sun Rise condominium project. In September 2002, Respondent McKellar mailed a form letter to members of the Association of Apartment Owners (AOAO) encouraging them to vote for Tesha Malama, a senatorial candidate in the district where Sun Rise is situated. The letter was written on Certified Management stationery and signed by McKellar as president of Certified Management. Prior to sending the letter, Respondent Certified Management discussed the letters with AOAO directors, who did not object to the letter. RICO charged Respondents with violating HRS §467-14 (violating this chapter; chapters 484, 514A, 514E, or 515; section 516-71; or the rules adopted pursuant thereto); and §436B-19 (grounds for revocation or suspension of license), (9) (conduct or practice contrary to recognize standards of ethics).

The Hearings Officer noted that RICO presented no evidence that Respondents actually used the membership list in mailing out the letter.

According to the record, Respondents instead used information from a database owned by Respondent McKellar. The Hearings Officer concluded that RICO failed to prove, by a preponderance of the evidence, that Respondents used the membership list to send out the letter. Therefore, there was insufficient evidence to establish that Respondents engaged in unethical conduct or violated HRS §467-14(13).

The Hearings Officer further said RICO did not sufficiently establish what the recognized standard of ethics for the profession is and what specific ethical considerations were breached.

The Hearings Officer further noted that RICO charged that use of the membership list to mail out a political endorsement violated HRS §514A-83.3 and, as such, §467-14(13).

However, the Hearings Officer said, nothing in §514A-83.3 precludes the use of membership by the members of the AOAO or its managing agent but simply provides one method by which the list must be made available to a member. Based on its findings and conclusions, the Hearings Officer recommended that RICO's petition be dismissed as to Count I.

On December 15, 2006, the Commission accepted and adopted only the Hearings Officer's conclusion that RICO failed to demonstrate that Respondents violated §467-14(13) and 436B-19(9) and neither accepts nor rejects the remaining conclusions of the law, finding them irrelevant to the disposition of this matter.

42% of AOAOs Register Online

The 2007-2009 Biennial Registration deadline passed on Thursday, May 31, 2007 with 642 or approximately 42% of associations utilizing the online application. As with the 2005-2007 Biennial Registration far fewer applications were deficient for those Associations that completed the online application than those who completed the application by mail.

An estimated 391 associations failed to submit registration applications by the registration deadline of May 31, 2007.

Associations that fail to register by June 30, 2007 are required to file as a new applicant, are subject to a \$50.00 penalty fee, and an additional 10% of the CMEF fee for late payment and registration.

Furthermore, Associations of Apartment Owners that fail to register are denied standing to maintain an action or proceeding in the courts of this State and may be referred to RICO for violations of section 514B-103, Hawaii Revised Statutes. It has been reported that some unregistered AOAOs have experienced problems in court proceedings to collect delinquent maintenance fees or lien action.

Applying the "Business Judgment Rule"

<u>Association of Apartment Owners of Ahuimanu Gardens</u> <u>v. Flint</u> – (Appeal number 26826 – December 2005)

Boards of directors are often advised to follow the "business judgment rule" in operating and managing their associations. Under the business judgment rule, a reasonable, good faith decision by the board is supposed to be upheld. Boards also often encounter situations in which an owner argues that the board cannot make the owner do something because nothing in the declaration and bylaws *specifically* gives the board the authority it is purporting to exercise. This case dealt with both issues.

The dispute arose after an owner refused to vacate her apartment to allow the building in which it was located to be tent fumigated for termites. She recognized that the law and the project's governing documents allowed the board to enter her apartment if necessary for the operation of the property. Nevertheless, she argued that the board lacked any specific authority to require her to *vacate* the apartment while the building was tented for termites. Therefore, the board could not compel her to vacate her apartment.

The Hawaii Supreme Court disagreed. The court held that:

- (1) The board's power and duty to maintain the common elements in the interests of everyone outweighed the owner's right to exclusive ownership and possession of her apartment (citing, among other cases, AOAO Kukui Plaza v. City and County of Honolulu for the proposition that the uniqueness of the condominium concept of ownership has caused the law to recognize that each unit owner must give up some degree of freedom of choice he or she might otherwise have enjoyed in separate, private property).
- (2) The bylaws determine whether the board had authority to contract for tent fumigation services. Despite the lack of the *express* authority in the bylaws to require the owner to temporarily vacate her unit, the broad general power given to the board of directors was sufficient to allow the board to

require the owner to vacate her unit (citing several mainland cases from the proposition that it would be impossible to list all the restricted uses in the governing documents of a condominium).

(3) Since the board's decision to treat termite infestation of the common elements by tent fumigation was a reasonable, good faith decision, it should be upheld (citing *McNamee v. Bishop Trust Co. Ltd.*, one of Hawaii's few business judgment rule cases.).

On that basis, the court ruled in favor of the association and required the owner to vacate her apartment for tent fumigation.

In this case, the board followed *all* the basic steps of dispute resolution — negotiation, mediation, arbitration, and circuit court — but still ended up in the Hawaii Supreme Court.

Unfortunately, although the Hawaii Supreme Court's decision in this case would be valuable to many associations, the case is marked as "Not For Publication," which means it cannot be cited as authority in any *other* case. (Not for publication decisions are frequently made by the court to expedite the hearing of a particular case, even though they do not provide precedent for the future.) Despite that circumstance, the case provides some indication of the thinking of the Hawaii Supreme Court under situations commonly faced by many boards of directors.

John A. Morris is a manager with Ekimoto & Morris, LLLC. Each year he publishes the "Director's Guide to Hawaii Community Association Law," a handbook for directors that includes the condominium law and other relevant statutes and an analysis of legal requirements relating to the management and operation of homeowner associations in Hawaii. From 2002 to 2005, Mr. Morris served as a member of the Blue Ribbon Recodification Advisory Committee, which was created by the Hawaii Real Estate Commission to provide advice and assistance in developing the 2005 recodification of the condominium law.

2007 Real Estate Commission Schedule

These committees meet one after another, beginning at 9 a.m.: Laws & Rules Review, Education Review, and Condominium Review

Wednesday, July 11, 2007 Wednesday, August 8, 2007 Wednesday, September 12, 2007 Real Estate Commission 9:00 a.m.

Friday, July 27, 2007 Friday, August 24, 2007 Friday, September 28, 2007

All meetings will be held in the Queen Liliuokalani Conference Room of the King Kalakaua Building, 335 Merchant Street, First Floor, Honolulu, Hawaii. Meeting dates, locations, and times are subject to change without notice. Please visit the Commission's website at www.hawaii.gov/hirec or call the Real Estate Commission Office at 586-2643 to confirm the dates, times, and locations of the meetings.

Mediation Case Summaries

MCP = Mediation Center of the Pacific, Inc.MSM = Mediation Services of Maui, Inc.

WHMC = West Hawaii Mediation Center

BOD = Board of Directors

KMC = Ku'ikahi Mediation Center

RICO = Regulated Industries Complaints Office

KEO = Kauai Economic Opportunity, Inc.

CMA = Condominium Managing Agent

CASES HANDLED BY MCP

Between January 1, 2007 and May 31, 2007, there were a total of four (4) cases involving condominium disputes. Two (2) were mediated, and two (2) were closed without mediating.

Parties	Complaint	Disposition
Owner vs. BOD	Dispute regarding privacy and fines	Mediated
BOD vs. Owner	Dispute involving pets	BOD declined
Owner vs. BOD	Dispute involving pets	Mediated
Owner vs. BOD	Dispute regarding privacy	BOD declined

CASES HANDLED BY MSM

Between January 1, 2007 and May 31, 2007, there were a total of five (5) cases involving condominium disputes. One (1) case was mediated, and four (4) were closed without mediating.

BOD vs. Owner	Pet dispute	Closed. No response from owner
Owner vs. BOD	Dispute regarding voting policies	Closed. No response from BOD
Owner vs. Owner	Interpretation of House Rules	Mediated
BOD vs. Owner	Bylaw violation regarding pets	No Agreement
BOD vs. Owner	Outstanding maintenance fees	Closed. No response from owner

CASES HANDLED BY WHMC

Between January 1, 2007 and May 31, 2007, there was one (1) case involving condominium disputes that was mediated.

Owner vs. BOD Dispute regarding use of units Mediated

CASES HANDLED BY RICO

Between January 1, 2007 and May 31, 2007, there was one (1) cases involving condominium disputes which was mediated.

Owner vs. BOD Dispute regarding assessment Mediated

(No cases reported by KEO, KMC)

Condominium Education Calendar

This calendar lists upcoming educational events of interest to the condominium community. The publishers express no opinion about the quality or content of any event they do not sponsor. This listing should not be construed as an endorsement or sponsorship of any event, unless expressly indicated. Events may be subject to change; please check directly with the provider to confirm each event.

Date	Time	Event Title	Location	Provider
7/21/07	8:30 am	*Legislative Update & Aging in Place	Dole Cannery	CAIH
8/30/07	11:30 am	*One Hour Board Meetings	Hale Koa Hotel	CAIH
9/18/07	TBA	Maintenance – SMA's Seminar	Cameron Center-Maui	CCM
10/18/07	TBA	*Board Dos and Don'ts	Hale Koa Hotel	CAIH
10/19/07	TBA	*Board Dos and Don'ts	Maui (TBA)	CAIH

^{*}The seminar is partly funded by funds from the Condominium Education Fund, Real Estate Commission, Professional and Vocational Licensing Division, Department of Commerce and Consumer Affairs, State of Hawaii for condominium apartment owners whose AOAO is currently registered with the Real Estate Commission.

Information is subject to change. For full information on the above-listed courses, please call the provider.

	Provider	Phone	Address
CAI	Community Associations Institute (National) www.caionline.org	(703) 548-8600	225 Reinekers Ln #300 Alexandria, VA 22314
CAI-H	Community Associations Institute - Hawaii Chapter www.caihawaii.org	488-1133	P.O. Box 976 Honolulu, HI 96808
CCM	Condominium Council of Maui www.mauicondocouncil.com	573-4231	PO Box 1362 Kihei, HI 96753
HAR	Hawaii Association of Realtors www.hawaiirealtors.com	733-7060	1136 12 th Ave., Ste. 220 Honolulu, HI 96816
HCAAO	Hawaii Council of Associations of Apartment Owners	737-2021	3454 Waialae, Ste. Honolulu, HI 96816
HSAP	Hawaii State Association of Parliamentarians www.hsap.org		98-238 Paleo Way Aiea, HI 96701
HSBA-CLE	Hawaii State Bar Association - Continuing Legal Educ.	537-1868	1132 Bishop St, Ste 906 Honolulu, HI 96813
IREM	Institute of Real Estate Management Hawaii Chapter No. 34 <u>www.iremhawaii.org</u>	847-0141	PO Box 17040 Honolulu, HI 96817
LOR	Lorman Education Services www.lorman.com		2510 Alpine Road Eau Claire, WI 54703
UH-OC	Noncredit Programs, Outreach College, University of Hawaii	956-8244	2530 Dole Street Honolulu, HI 96822

Real Estate Branch and Real Estate Commission's web page at: http://www.hawaii.gov/hirec Address: 335 Merchant Street, Rm. 333; Honolulu, HI 96813; Phone: (808) 586-2643

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